## QUESTIONS PRESENTED

1. Whether the recent decision of this Court in Lehman v Lycoming County Children's Services Agency determined that habeas corpus is not proper relief when a state has terminated involuntarily parental rights, thereby making the grant of a writ of certiorari inappropriate on the instant case?

2. Whether the res judicata principle bars Petitioners' civil rights claims under USC §1983 when those claims were not litigated in state court?

3. Whether the Eleventh Amendment bars Petitioners' damage claims against the Respondents?

4. Whether the petition for certiorari should be denied in recognition of the principle of finality which is of paramount importance when parental rights have been terminated?

## NAMES OF PARTIES

The only party to these proceedings whose name is not included in the caption of the case is Donald Wayne Castorr, subject of these proceedings.

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

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No. 82-48

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WILLIAM and MARY LOU CASTORR, Petitioners,

vs.

JOHN M. BRUNDAGE, et al., Respondents.

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PETITION IN OPPOSITION TO A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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The Respondents, John M. Brundage, Calhoun County Probate Court, Leonard Shumate and Gloria Shumate, respectfully pray that Petitioners' Petition for Certiorari be denied and that the judgment and opinion of the United States Court of Appeals for the Sixth Circuit entered in this proceeding on March 23, 1982 be allowed to stand.

## OPINION BELOW

The opinion of the Court of Appeals is reported at 674 F.2d 531. The District Court opinion, which was affirmed by the Sixth Circuit, is unreported.

## JURISDICTION

The judgment of the Court of Appeals for the Sixth Circuit was entered on March 23, 1982. The petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 USC Section 1254(1).

## STATUTES INVOLVED

United States Code, Title 28:

Section 2241(c)(3).

The writ of habeas corpus shall not extend to a prisoner unless--

(3) he is in custody in violation of the constitution or laws or treaties of the United States; . . .

Section 2254(a)

The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

United States Code, Title 42:

Section 1983. Civil action for deprivation rights.

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other persons within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party

injured in an action at law, suit in equity, or other proper proceeding for redress.

Eleventh Amendment:

The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

## STATEMENT OF THE CASE

Respondents accept the Statement of the Case as set forth in Petitioner's Petition.

## REASONS FOR NOT GRANTING THE WRIT

1. THE DECISION OF THIS COURT IN LEHMAN v LYCOMING COUNTY CHILDREN'S SERVICES AGENCY DETERMINED THAT HABEAS CORPUS IS NOT PROPER RELIEF WHEN A STATE HAS TERMINATED INVOLUNTARILY PARENTAL RIGHTS, THEREBY MAKING THE GRANT OF A WRIT OF CERTIORARI INAPPROPRIATE IN THE INSTANT CASE.

Petitioners are attempting to use habeas corpus as a means to skirt the traditional barriers of res judicata, collateral estoppel, and claim/issue preclusion. Habeas corpus is, of course, an exception to those traditional bars to an action. The question which must be raised is whether habeas corpus is appropriate in a termination of parental rights situation. This Court has conclusively answered that question in the negative by stating that:

> . . . extending the federal writ to challenges to state child custody decisions--challenges based on alleged constitutional defects collateral to the actual custody decision--would be an unprecedented expansion of the jurisdiction of the lower federal courts. Lehman v Lycoming County Children's Services Agency, No. 80-2177, slip op. at 9 (U.S. June 30, 1982).

Habeas corpus has never been a generally available remedy, and has never been available to challenge child custody. This case which is like Lehman as it involves custody after parental rights have been terminated, lacks a party in interest who is in custody within the meaning of 28 USC§2254. A child who has been placed in a foster home pursuant to a termination of parental rights is not in custody within the meaning of 28 USC §2254 as determined by this Court in Lehman when it stated:

> They are in the 'custody' of their foster parents in essentially the same way, and in the same extent, other child-

> ren are in the custody of their natural or adoptive parents. Their situation in this respect differs little from the situation of other children in the public generally; they suffer no unusual restraints not imposed on other children. slip op. at 8.

Donald Wayne Castorr is in the custody of his foster parents, but he is far from suffering unusual restraints. On the contrary, Donald has grown physically and emotionally during his years with his foster parents.

To provide a seventh forum for the hearing of this case by granting a writ of certiorari is inappropriate and would, in fact, be harmful to the forgotten victim of this case, the child, Donald Wayne Castorr, by frustrating the important judicial principle of finality articulated by this Court in its Lehman decision.

In exploring whether Petitioners are the proper parties to ask for habeas corpus,

it must first be noted that the interests of Donald Castorr, the minor child, and his biological parents are not necessarily the same. This conflict was recognized at the outset of the District Court's opinion and was the reason why the District Court appointed Mr. Thomas D. Geil as next friend of Donald Wayne Castorr. While the biological parents have an interest in maintaining the integrity of the family unit, a child has the right to physical and mental growth which may be impeded or destroyed by that very family unit, as was the situation in the instant case. Judge Adams, in Lehman v Lycoming County Children's Services Agency, 648 F.2d 135 (3d Cir. 1981), cert. granted 50 USLW 3244 (Oct. 6, 1981) (No. 80-2177), points out how the interests of the biological parents and the children diverge, especially in a stiuation where the parents' rights are terminated. Judge

Adams states:

> While the intervention of the state via parental termination proceedings signals a potential nonalignment of the parent and child's interests, another element - the interest in finality - is likely to be valued quite differently by parent and child. The parent's prime interest is theoretically in restoring family unity; the redundancy of habeas corpus and the prolongation of litigation is a burden which the parent may consider worth enduring for the sake of reestablishing parental rights. For the child, however, a prompt end to litigation and the clear establishment of a permanent association with a parent figure would seem to be the important goal. From this perspective, it would not appear that the writ of habeas is being exercised here on behalf of the children. This is especially so in a termination situation, where the unqualified ending of the original relationship offers the child an opportunity for an uninterrupted association following adoption by a new parent figure. Moreover, the prospect of a parent bringing a habeas petition on a child's behalf years after the termination of parental rights, and years after the child has attained an established relationship with another parent figure, presents an even greater potential conflict between the parent and child's interests. 648 F.2d at 154.

Judge Campbell, in Sylvander v New England Home for Little Wanderers, 584 F.2d 1103 (1st Cir. 1978), addresses the problem and suggests the solution fashioned by the District Court in this case when he said:

> Indeed, several years of state court litigation resulted in the determination that the Home, a charitable institution established to promote the welfare of children, is correct in arguing that Michael's best interests lie in his being adopted. Thus, if this court were to recognize the availability of federal habeas in child custody cases, the proper party to seek the Great Writ on Michael's behalf in this case might as well be the Home as Ms. Sylvander. 584 F.2d at 1111.

If this Court should allow a writ of certiorari to issue, Donald Wayne Castorr's best interests will not be served. He is entitled to stability so that he can continue to grow, physically and mentally. The granting of certiorari would only prolong the uncertainty Donald Castorr has been living with for almost seven years.

2. THE RES JUDICATA DECISION BELOW WAS CORRECTLY DECIDED AND THERE IS NO COMPELLING REASON WHY THIS COURT NEED EXAMINE THAT DECISION BY ISSUING A WRIT OF CERTIORARI.

Petitioners had the opportunity to raise the constitutional questions in this case in the Michigan Juvenile Court, Circuit Court and Court of Appeals. They did, in fact, raise the issue for the first time on appeal to the Michigan Supreme Court. Therefore, Petitioners had the opportunity to raise the issue, but purposely chose not to do so until the case was being reviewed by the highest Michigan Court.

If this case is considered, as Petitioners conclude it should be, as one where the constitutional claims were not actually raised and litigated in earlier state court proceedings but could have been raised, the precedent of this Court would be followed. However, this

Court has not decided this issue, and in the case of Allen v Curry, 449 U.S. 90 (1980), this Court, in a footnote, specifically declined to decide the issue. In Allen, at page 97 n. 10, the Court asserts that the Petitioners' position is definitely in the minority when it states:

> A very few courts have suggested that the normal rules of claim preclusion should not apply in §1983 suits in one peculiar circumstance: Where a §1983 plaintiff seeks to litigate in federal court a federal issue which he could have raised but did not raise in an earlier state court suit against the same adverse party. These cases present a narrow question not now before us and we intimate no view as to whether they were correctly decided.

Respondents would agree with Petitioners that the circuits are split on the question of whether to apply the res judicata doctrine to 42 USC§1983 federal court claims where the constitutional claim could have been, but were not, raised in an earlier state court proceeding. That

split of opinion is amply demonstrated in their petition. In the case presently before this Court, Petitioners had every opportunity to raise the issues presented to the District Court at the state level, but chose not to do so until they reached the Michigan Supreme Court. It was Petitioners' apparent strategy to appeal the factual determination at the state level and the §1983 constitutional questions at the federal level. This strategy is wasteful of our judicial system and denies the need for finality which is of overriding importance in a case of termination of parental rights. The need to avoid this prolongation of litigation is critical when parental rights have been terminated, because it is the child involved who suffers. The present case took three years to pass through the Michigan Appellate system alone. The rule which Petitioners would commend to this Court

would allow and encourage the parties to save their constitutional issues until after the state appellate remedies have been exhausted, thereby extending the litigation even further.

The Sixth Circuit, in deciding this issue, recognized the importance of finality in these types of cases and the importance of using the state forum to resolve such issues when they stated:

> Cases involving matters of probate, see Tonti v. Petropoulous, 656 F. 2d 212 (6th Cir. 1981), or domestic relations, as in the present proceeding, present situations in which the importance of finality is compelling. Further, in these types of cases, federal courts historically have deferred to the expertise of State courts, and have avoided accepting jurisdiction under the principles of comity. Thus, substantive federal policy supports the application of res judicata to the §1983 constitutional claims of appellants. Castorr, 674 F.2d at 536, 537.

In the instant case, the litigation has already been protracted, creating a devastating limbo for the minor child who

is the crux of the litigation. State courts are adequately able to decide the issues which have been presented to the Federal District Court in this case. Those issues should have been presented at the state level for decision and Petitioners should be precluded from bringing forth those issues at this late date. There is no good reason why this Court should provide yet another forum in the present case. The policy reasons expressed by the Sixth Circuit are sound and to extend litigation in the present case only will victimize further the subject of this case, Donald Wayne Castorr.

3. THE PETITION FOR CERTIORARI SHOULD BE DENIED AS THE SIXTH CIRCUIT'S OPINION ON THE QUESTION OF ELEVENTH AMENDMENT JUDICIAL IMMUNITY WAS CORRECT AND CONSISTENT WITH THE OPINIONS OF THIS COURT.

Petitioners, in their District Court

Complaint, ask for preliminary and permanent injunctions against the Calhoun County Probate Court. The Calhoun County Probate Court is a subdivision of the State of Michigan. The Eleventh Amendment, by its terms, bars any action in law or in equity against one of the states by citizens of another state, or citizens of another country. Missouri v Fiske, 290 U.S. 18 (1933). The amendment has been extended, by interpretation, to confer immunity in actions by the defendant state's own citizens as well. Hans v Louisiana, 134 U.S. 1 (1890). Therefore, the Eleventh Amendment would be a bar to the equitable injunctive relief sought by Petitioners in their District Court complaint and a suit against the Calhoun County Probate Court was correctly dismissed. Missouri v Fiske.

The Michigan Department of Social Services is also a division of the State

of Michigan. Once again, the Eleventh Amendment and the cases interpreting it are clear that, absent a waiver by the state, a federal court is powerless to entertain any claim for retrospective monetary relief against the state. Petitioners' District Court complaint asks for such relief against the Michigan Department of Social Services, and is therefore properly dismissed.

Individual state officials are also sued in Petitioners' District Court complaint. The Eleventh Amendment extends protection to such individuals acting within their official capacities. Edelman v Jordan, 415 U.S. 651 (1974). While a plaintiff can clearly sue a state official in his or her individual capacity, the complaint must state some action taken outside of the scope of that individual's capacity. As the District Judge found in the present case, no such matters were

alleged, and the dismissal of the suit against the state officials was improper.

Judicial immunity as to the injunctive and declaratory relief was granted to Judge Brundage by the District Court. The Sixth Circuit Court of Appeals affirmed, saying: "We hold that Judge John M. Brundage is absolutely immune from liability for money damages. Stump v Sparkman, 435 U.S. 651 (1974)." This issue could very well have been decided on res judicata. Cheramie v Tucker, 493 F.2d 586 (5th Cir.) cert. denied, 419 U.S. 868 (1974). This issue simply proposes a new challenge to the constitutionality of a law after the proper channels of appeal have been closed by the Petitioners' own actions.

4. THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED IN RECOGNITION OF THE PRINCIPLE OF FINALITY WHICH IS OF PARAMOUNT IMPORTANCE WHEN PARENTAL RIGHTS

HAVE BEEN TERMINATED.

This is the seventh court to review and consider the matter of Donald Wayne Castorr. At the initial hearing of this case, the Court concluded that Donald's physical condition was brought about by emotional deprivation and could only be reversed by placing Donald in a stable and permanent setting. The findings of the Juvenile Court were made a part of the Sixth Circuit opinion. Donald has been in that stable environment he so desparately needs, but that could be changed if the decisions of the lower courts should be overturned. Having cases decided quickly and in a final manner is thus not only important as a judicial principle, but is especially important to the children involved when parental rights are terminated. As this Court stated in Lehman v Lycoming County Children's Services Agency:

> The state's interest in finality is unusually strong in child custody disputes. The grant of federal habeas would prolong uncertainty for children such as the Lehman sons, possibly lessening their chances of adoption. It is undisputed that children require secure, stable, long-term, continuous relationships with their parents or foster parents. There is little that can be as detrimental to a child's sound development as uncertainty over whether he is to remain in his current 'home', under the care of his parents or foster parents, especially when such certainty is prolonged. Extended uncertainty would be inevitable in many cases if federal courts had jurisdiction to relitigate state custody decisions. slip op. at 11.

Unfortunately, the harm to Donald Wayne Castorr continues as long as this case remains open. He is a forgotten victim who stands a good chance of being lost through an overuse of the judicial process. The public interest can only be served by allowing the Juvenile Court to attempt to fulfill the needs of this child, thereby creating a healthy child, and sub-

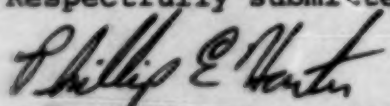
sequently, a healthy adult. That court diagnosed the problem of the child's relationship to his natural parents and terminated their parental rights. Termination of parental rights was the only means available to establish the ultimate objective of permanency and stability for the child. Only by establishing a stable and permanent home could the emotional harm suffered by Donald Wayme Castorr in the home of the natural parents be reversed.

These public policy objectives support and reinforce the principle of finality in the termination of parental rights situation. That principle was recognized by the Sixth Circuit in their rapid disposition of the appeal before them. Respondents, therefore, request that this Court again recognize that principle of finality by quickly denying the Petition for Writ of Certiorari.

## CONCLUSION

For the reasons set forth herein, Respondents respectfully request that the writ of certiorari be denied.

Respectfully submitted,



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